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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 617.

ASSARIA STATE BANK OF ASSARIA, CITIZENS BANK OF AXTELL, *ET AL.*, *APPELLANTS*,

VS.

JOSEPH N. DOLLEY, AS BANK COMMISSIONER OF THE STATE OF KANSAS, AND MARK TULLEY, AS STATE TREASURER OF THE STATE OF KANSAS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF FOR APPELLANTS.

JOHN LEE WEBSTER,
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Solicitors for Appellants.

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Of Counsel.

REED PRINTING COMPANY

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STATEMENT OF CASE.

This is a suit in equity by 47 State Banks of Kansas on their own behalf and on behalf of all other banks in Kansas similarly situated, to have Ch. 61 of the Laws of 1909 of the State of Kansas, commonly known as Bank Depositors Guaranty Law, decreed to be unconstitutional and void and its enforcement enjoined.

The case was heard in the United States Circuit Court for the District of Kansas on the bill and the defendants demurrer thereto; the demurrer was sustained and decree entered dismissing the bill. A summary of the facts set forth in the bill of complaint are as follows:

I. The complainant banks were all doing business in Kansas prior to the adoption of the Bank Depositors Guaranty Law of 1909, and that the defendants Joseph N. Dolley and Mark Tulley, in their respective capacities, are charged with the enforcement of the provisions of said law of 1909.

II. Paragraph II avers jurisdictional facts.

III. Kansas has a general banking law which took effect March 11, 1897, containing general provisions for the organization and regulation of state banks. Said general banking law contained no provision by which banks could be required to make deposits with the State Treasurer or submit to assessments for the creation of a guaranty fund for the security of depositors as in the Act of 1909 provided. At the time when the complainant banks were organized the General Banking Laws of Kansas provided (Sec. 10) that "the share holders of every bank organized under this Act shall be additionally liable for a sum equal to the par value of stock owned and no more;" and there were no provisions in the said Banking Laws by which the assets of any bank could be appropriated by the Bank Commissioner, or State Treasurer for the payment of claims of depositors in any other banks, which might fail in business. Under the General Banking Law in case of insolvency (Sec. 28) the assets should be paid to creditors of the bank without discrimination or preference. Complainant banks rely-

ing on said banking law, and acting in good faith thereunder "have made deposits with other State banks and have given credit to other State banks," relying upon the General Banking Law of the state "that in the event of insolvency of any bank or banks to which complainants have so extended credits, or with whom they have made deposits, such bank or banks would be liable unto these complainants" for the payment to them on their claims of a *pro rata* share of the assets of such insolvent banks. Complainant banks under the General Banking Laws severally received certificates authorizing them to do a banking business and under which they are entitled to continue in said banking business. Under said General Banking Laws, persons, firms and associations are authorized to do a private banking business, and private banks do exist which are denied privileges under the Bank Depositors Guaranty Law.

IV. The purpose and intent of the Bank Depositors Guaranty Law is to limit the privileges of the Act to "incorporated" banks and to *exclude private banks and trust companies.* To that end it is provided in Sec. 1, "any incorporated state bank having a paid up and unimpaired surplus fund equal to ten per cent of its capital, and any bank which may after the passage of this act be authorized to do business in this State, and which shall have been actively engaged in the business of banking for at least one year," is authorized and empowered to participate in the assessments and benefits, and to be governed by the regulations of the bank depositors' guaranty fund of the state of Kansas in said act, "provided that the limitation of one year shall not prevent such participation by a new bank at any time in any city or town in which all banks shall have neglected or failed to become guaranteed banks under the provisions

of this act, for a period of six months after the taking effect of this act."

That by Sec. 8 of said Act it is provided that trust companies and private banks, if they shall reorganize as incorporated State Banks may become guaranteed banks by complying with the provisions of the said act as in said Sec. 8 directed and provided. The purpose and intent of said Sec. 8 coupled with the provisions of said Sec. 1, above referred to, was and is to require all trust companies and all private banks and all national banks to become incorporated state banks subject to the control of the Bank Commissioner, and by way of inducement thereto that they, when so reorganized, may become guaranteed state banks of the State of Kansas; otherwise that they shall be and are intended to be discriminated against under and by virtue of the said Act of March 6th, 1909. Said Act, while voluntary in form, is in it application, force and effect a compulsory law in that it compels all banks, private or incorporated, and all trust com panies, and all national banks in the State of Kansas, to become incorporated state banks, or be unjustly and unlawfully discriminated against, in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States, which provides, among other things; "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

V. It is provided in Sec. 1 that a bank desiring to become a guaranteed bank shall file with the Bank Commissioner "a resolution of its Board of Directors, authorized by its stockholders" making such request. A resolution adopted by a majority of the stockholders present at a stockholders meeting, approved by a majority of a

quorum of the Board of Directors would comply with the said statutory provision, even though absent stockholders and non-concurring directors protested, whereby dissenting stockholders and directors are deprived of property and of property rights without due process of law and are denied the equal protection of the laws in violation of Sec. 1 of Fourteenth Amendment of the Constitution of the United States, and is in violation of Sec. 1 of Bill of Rights of the Constitution of Kansas, which provides "all men are possessed of equal and inalienable natural rights, among which are life, liberty and the pursuit of happiness" and in violation of Sec. 2 of said Bill of Rights, which provides "all political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit."

VI. Sec. 2 of the Bank Guaranty Law requires banks before receiving a certificate, to deposit in bonds or money $500 for every $100,000 of average deposits. *In addition to said deposit "each bank shall pay in cash an amount equal to one-twentieth of one per cent of its average deposits eligible to guaranty, less its capital and surplus, and the same shall be credited to the Bank depositors' guaranty fund with the State Treasurer," subject to the order of the Commissioner.. Thereupon said bank shall be entitled to a certificate reciting that it is "guaranteed" as in said act provided.*

Sec. 3 of the Act provides for an assessment in January of each year of one-twentieth of one per cent on the average deposits of each bank until the guaranty fund shall be $500,000 and in case the fund shall become depleted for additional assessments not exceeding five (5) in number in each year of one-twentieth of one per cent.

By Sec. 4 it is provided that the Commissioner shall take charge and wind up the affairs of any insolvent bank and *"issue to each depositor a certificate"* bearing 6 per cent. After the receiver shall have realized all the assets and exhausted the *double liability* of stockholders and *shall have paid all funds so collected in dividends to* the depositors, the Bank Commissioner shall draw checks *"payable out of the bank depositors' guaranty fund"* in favor of each *depositor* for the balance due upon his claim.

Private depositors whose claims are guaranteed are given a preferential claim to the full amount thereof plus six (6) per cent over all other creditors of such insolvent bank and the assets so applied to the exclusion of other creditors; whereby said Act impairs the obligations existing between banks and their other creditors whose claims are not guaranteed in violation of Sec. 10 of Art. 1 and Sec. 1 of Fourteenth Amendment of Constitution of the United States.

Complainant banks are required to and do have and make deposits with other banks, and complainants so having deposits in a bank which may become insolvent will be deprived of their legal and constitutional right to share *pro rata* with other creditors in the assets of such insolvent bank, and their contracts with such bank will be impaired in violation of Sec. 10, Art. 1, and Sec. 1 of Fourteenth Amendment of the Constitution of the United States.

VII. By Sec. 6 the only deposits which have the benefit of the guarantee are: (a) Deposits not bearing interest; (b) Time certificates not payable in less than six months, and not exceeding one year from date, bearing interest not exceeding 3 per cent ceasing at maturity;

(c) Savings accounts not exceeding $100 to one person, not subject to check and upon which 60 days' notice of withdrawal is reserved, with interest not exceeding 3%.

The following deposits are not guaranteed: (d) Deposits drawing interest; (e) Time certificate payable in less than six months; (f) Certificate running more than one year (g) Certificates bearing more than 3% interest; (h) Savings deposits for more than $100.00; (i) Savings deposits which do not require 60 days' notice of withdrawal; (j) Savings accounts drawing more than 3% interest. All said deposits in this paragraph are arbitrarily discriminated against.

By Sec. 6 the following claims and deposits of complainant banks and other like banks are unlawfully discriminated against and do not have the benefit of the guaranty fund; (k) Rediscounts; (l) Deposits of money received from bills payable; (m) Money from other banks.

In the Banking business in Kansas it is necessary for complainant banks and others to borrow money temporarily from other banks, to rediscount paper for other banks, receive and handle checks, drafts, bills of exchange and all which claims, credits, loans and discounts are entitled to share *pro rata* with other claims against insolvent banks, but which by Sec. 6 are excluded from the benefit of the guaranty fund, and are discriminated against and excluded from any share in the assets until guaranteed depositors are first paid in full, plus interest; by reason whereof Sec. 6 is in violation of Sec. 10, Art. 1 and Sec. 1 of Fourteenth Amendment to Constitution of United States.

VIII. Sec. 7 excludes a bank from the guaranty fund which pays more than 3% interest on any deposit or on savings deposits withdrawn before July or January

1st after date of deposit, or interest on any time certificate before maturity; whereby said Sec. 7 deprives all depositors in any bank which violates said provisions of Sec. 7 *from any share in the guaranty fund,* and which said classification and discrimination is unreasonable, unjust and arbitrary; and whereby Sec. 7 violates contracts between the depositors and the banks, all in violation of Sec. 10, Art 1 and Sec. 1 of Fourteenth Amendment of the Constitution of the United States.

IX. The amount of deposit required under Sec. 2 and assessments provided for in Secs. 2 and 3 of the Act will as to each of complainant banks exceed the sum of $2,000, exclusive of interest and costs. Depositors in non-guaranteed banks have not the benefit of the guaranty fund, while depositors in other banks are induced to believe that their deposits are fully guaranteed by the State of Kansas, the result of which will be to force unguaranteed banks out of business, or to submit to assessments upon their stockholders for the purpose of raising a surplus of 10% of their capital and to cease paying interest on more than 3% of any and all deposits, and relinquish valuable rights guaranteed to them under the Constitution and laws of Kansas, and of the United States. Thirteen of complainant banks have not the 10% surplus fund necessary to become guaranteed banks as provided in Sec. 1, yet are authorized under the General Banking Laws of the State of Kansas to continue in business, and are without legal authority to compel their stockholders to submit to an assessment to create such fund. That the value of the right of each of the complainant banks to transact a banking business is more than $2,000 exclusive of interest and costs, and the value of the rights which the complainants would be compelled

to surrender in order to become guaranteed banks exceeds $2,000 exclusive of interest and costs.

X. That the purpose, object and intent of the Bank Guaranty Law is to take the property of, and to compel all banks which accept of said Act, to set apart and deposit with the State Treasurer bonds, moneys and assessments as in Secs. 2 and 3 of said Act provided, to be appropriated in the payment of private claims of guaranteed depositors in any bank that may become insolvent, and which payment is a gratuity to such private depositors, and to whom the contributing banks are under no obligation, and is an unlawful and wrongful taking of the money and property of contributing banks without due process of law, and is a denial to each of them of the equal protection of the laws; whereby said Bank Guaranty Deposit Law is unconstitutional and void.

Said banks had no right to embark their funds in any scheme for the guarantee of the payment of deposits in other banks and the stockholders had a right to object thereto, and which was a valuable contract right and property right of said stockholders, and that the Bank Guaranty Deposit Law impairs the contract rights of said stockholders and deprives them of property without due process of law. It diminishes the assets of such banks which give value to said stock, and takes the property of said stockholders to pay debts for which they are in no way liable without any benefit to them, and without relieving them in any way from their liability as stockholders.

XI. Said Act is unconstitutional and void in that it creates unlawful and unreasonable discrimination between banks which do and banks which do not become guaranteed banks, and arbitrarily discriminates between

banks in this, to-wit: that banks which pay more than 3% on deposits are excluded, while banks which do not pay more than 3% may become guaranteed banks; that banks which have not a surplus equal to 10% of the capital stock are excluded, while banks having such surplus may become guaranteed banks; that banks that have not done business for more than one year are excluded, while others are not excluded; in cities where all existing banks do not accept of the Act within 6 months, a newly created bank in said city may immediately become a guaranteed bank, whereby said Act deprives banks which do not, or can not accept of its provisions, of property without due process of law, and denies to them the equal protection of the laws.

XII. Said Act creates an unlawful and unreasonable discrimination between banks in this, to-wit: banks which have equal deposits subject to guaranty, but unequal capital and surplus are not subject to the same assessments to protect the same amount of deposits, banks having the largest capital and surplus pay the smallest assessment, and banks having the smallest amount of deposits pay assessments at a higher per cent rate than other banks; whereby certain banks are deprived of property without due process of law in violation of Sec. 1, Art. 14 of the Constitution of the United States.

XIII. Said Act is unconstitutional and void in that it creates unlawful and unreasonable discrimination between depositors, and between others doing business with the same banks in this, to-wit: (a) That depositors whose deposits bear interest are excluded, while depositors whose deposits do not bear interest are included in the guaranty fund; (b) Depositors whose deposits are represented by certificates payable more than 6 months, but not

more than one year from date, bearing interest of 3% ceasing at maturity, are included, while certificates bearing different terms as to time of payment and rate of interest are excluded from the guaranty fund. (c) Depositors having savings accounts not exceeding $100 not subject to check, and subject to 60 days' notice of withdrawal are included, while savings accounts exceeding $100, or which are subject to check, or which are not subject to the 60 days' notice of withdrawal, or which bear interest at more than 3% are excluded from the guaranty fund. (d) Deposits not bearing interest on proof of claim are entitled to a certificate which shall draw 6% interest, while deposits which bear 3% are only entitled to a certificate bearing 3%. Said classification deprives certain depositors of the equal protection of the laws and deprives them of property without due process of law.

XIV. Said Act in its effect embarks the state in the business of an insurance company. The State printers at expense of State prints and furnishes records to be used, and Bank Commissioner and State Treasurer and their assistants are paid by the State for time employed in carrying out the law. To carry said law into effect with the 700 banks in the State would be a great expense to the State; that the State is without power to embark in the business of insurance of deposits or to spend State money in carrying the same on, whereby money is taken from the tax payer without due process of law and deprives them of property without due process of law.

That complainant banks and their share-holders are tax payers and will be required to continue to make payment of taxes, and that unless enjoined the defendants will continue to pay out of the tax fund sums of money

for the purposes stated in an amount not exceeding $2,000 to any one bank. Said Law in its practical application is intended to be and is unlawfully discriminatory in favor of banks which do, and against all banks, State and National, which do not become guaranteed banks. It gives depositors a false assurance that they are guaranteed, when in fact not guaranteed. Said act by reason of the certificate issued to guaranteed banks enables them to hold out to the public that depositors therein are guaranteed and depositors in other banks not guaranteed, whereby banks of small capital and otherwise insecure may obtain deposits, and deplete deposits in other banks to the disadvantage of all banks which do not or can not become guaranteed; whereby said act is unconstitutional and void in that it creates an unlawful discrimination in favor of certain banks and against other banks and trust companies and is in violation of Sec. 1, Art. 14, Constitution of the United States.

Said Act is unconstitutional and void in that it creates an unlawful and unreasonable discrimination in the following particulars: (a) Depositors in one bank have the privileges of the guarantee fund while depositors in other banks do not have such privileges; (b) Certain banks by reason of the provisions of the Act are excluded while other banks may become guaranteed banks; (c) Guaranteed depositors in guaranteed banks have preferential claim over all other creditors, even to the absorption of all the assets of the bank to the exclusion of other creditors. In non-guaranteed banks all creditors share *pro rata* in the division of the assets.

XV. Paragraphs 15-16 and 17 relate to the ineffective repealing clause in the Statute and that the Sections in the Act complained of as unconstitutional are essential

and material parts of the Act without which it would not have been passed, and that the defendants mean and intend to enforce the said unconstitutional law unless enjoined, and contain a prayer for appropriate relief.

Demurrer. To the complaint the defendants filed a demurrer (rec. p. 27) which demurrer the court sustained and a decree was entered dismissing the bill at the cost of the complainants. (rec. p. 66).

ASSIGNMENT OF ERRORS.

First. That the said court erred in entering its decree and order sustaining the demurrer of the defendants and dismissing the complainants' bill of complaint.

Second. The said court erred in ruling that the complainants' bill of complaint did not set forth sufficient facts to entitle the said complainants to an order of injunction against the defendants as prayed in the said bill of complaint.

Third. The said court erred in holding that the complainant banks are not unduly and unlawfully discriminated against in violation of the Constitution of the United States by Ch. 61, Laws of 1909, of the State of Kansas, commonly known as the Bank Guaranty Law of the State of Kansas.

Fourth. The said court erred in holding that because the said complainant banks might accept the privileges of the Bank Guaranty Law of the State of Kansas, (Ch. 61, Laws of 1909), the complainant banks are not unlawfully and wrongfully discriminated against by the said Bank Guaranty Law, and, therefore can not be heard to complain of the said law.

Fifth. The said court erred in holding that the complainant banks which are disqualified from participating in the benefits of the Kansas Bank Guaranty Act, (Ch. 61, Laws of 1909) are not unlawfully and wrongfully discriminated against by the said Act.

Sixth. The said court erred in holding that the complainant banks are not discriminated against and their contract rights are not impaired on the ground that it is not averred in the bill of complaint that any of the banks in which the complainant banks have deposits, credits or contract obligations have failed, or their affairs about to be settled under the provisions of the Kansas Bank Guaranty Act.

Seventh. The said court should have found that Ch. 61, of the Laws of 1909 of the State of Kansas, commonly known as the Bank Guaranty Act of the State of Kansas, unjustly and unlawfully discriminated against each and all of the complainant banks and deprived each and all of the complainant banks of property without due process of law, and was, and is, as to each of the complainant banks, in violation of Sec. 10, of Art. 1, of the Constitution of the United States, which forbids any state passing a law impairing the obligation of contracts, and in violation of Sec. 1 of Art. 14, of Amendments to the Constitution of the United States, which provides that no state shall make or enforce any law which denies to any person within its jurisdiction the equal protection of the laws, and is in violation of Sec. 17 of Art. 2 of the Constitution of the State of Kansas which provides: "All laws of a general nature shall have a uniform operation" throughout the state, and is in violation of Sec. 16 of Art. 2 of the Constitution of the State of Kansas, which provides: "No law shall be revived or amended,

unless the new act contain the entire act revived, or the section or sections amended, and the section or sections so amended shall be repealed," and by reason of the premises that (Ch. 61 of the Laws of 1909) of the State of Kansas, commonly known as the Bank Guaranty Act of the State of Kansas is unconstitutional, null and void, and that its enforcement would result in damage and irreparable injury to the complainants and each of them.

EXCERPTS FROM THE BANK DEPOSITORS' GUARANTY LAW

Sec. 1. "Any incorporated state bank" having a "surplus fund equal to ten per cent of its capital" and having been engaged in business "for at least one year" may become a guaranteed bank. * * * "Before any bank shall become a guaranteed bank within the meaning of this Act a resolution of its board of directors, authorized by its stockholders," duly certified shall be filed with the Bank Commissioner.

Sec. 2. Each bank shall deposit with the State Treasurer bonds or money "to the amount of $500 for every $100,000 or fraction thereof of its average deposits eligible to guaranty." * * * "In addition to above each bank shall pay in cash an amount equal to one-twentieth of one per cent of its average deposits eligible to guaranty, less its capital and surplus, and the same shall be credited to the bank depositors' guaranty fund with the State Treasurer."

Sec. 3. * * * "Should such fund become depleted the Bank Commissioner shall make such additional assessments from time to time as may become necessary to maintain the same."

Sec. 4. * * * "After the officer in charge of the bank shall have realized upon the assets of such bank and exhausted the double liability of its stockholders, and shall have paid all funds so collected in dividends to the depositors, he shall certify all balances due on guaranteed deposits (if any exist) to the Bank Commissioner, who shall then, upon his approval of such certification, draw checks upon the State Treasurer, to be countersigned by the Auditor of State, payable out of the bank depositors' guaranty fund, in favor of each depositor for the balance due on such proof of claim as hereinafter provided."

Sec. 6. "Deposits which do not bear interest and the following deposits only shall be guaranteed by this Act: Time certificates not payable in less than six months from date and not extending for more than one year, bearing interest at not to exceed three per cent per annum and on which interest shall cease at maturity; savings accounts not exceeding in amount one hundred dollars to any one person and not subject to check, upon which the bank has reserved in writing the right to require sixty days' notice of withdrawal, and bearing interest at not to exceed three per cent per annum. Deposits which are primarily rediscounts or money borrowed by the bank, and all deposits otherwise secured, shall not be guaranteed by this Act." * * * "The guaranty as provided for in this Act shall not apply to a bank's obligation as indorser upon bills rediscounted, nor to bills payable, nor to money borrowed temporarily from its correspondents or others."

Sec. 7. * * * "No bank which pays interest at a rate greater than three per cent per annum on any form of deposit, or pays any interest on savings deposits

withdrawn before July 1st or January 1st next following the date of the deposit, or on any time certificate cashed before maturity, shall be permitted to participate in the benefits of this Act."

Sec. 8. "Any trust company * * * may reorganize as a State bank under the laws of this State by filing with the Secretary of State an amended charter signifying such purpose, to be approved by the Charter Board and any *private bank or national bank* having the required capital and being otherwise qualified, may reorganize as a State bank."

BRIEF OF THE ARGUMENT.

I.

THE SAID BANK GUARANTY LAW ON THE FACE THEREOF MAY BE TERMED A VOLUNTARY GUARANTY LAW AS DISTINCT FROM A COMPULSORY GUARANTY LAW, BUT THEREIN RESTS ONE OF ITS FUNDAMENTAL INFIRMITIES BECAUSE IT CREATES ARBITRARY DISTINCTIONS AND CLASSIFICATIONS BETWEEN BANKS AND DEPOSITORS NOT JUSTIFIED BY CONDITIONS.

Heretofore there existed in the State of Kansas a general banking law under which all State banks (700) were organized and engaged in banking business. They enjoyed equal privileges and assumed equal obligations. Each of said banks had equal opportunities to solicit deposits, and depositors had equal claims and rights each with the other in any bank that might become insolvent. Each of the banks became organized and each of the stockholders in the respective banks assumed obligations under the law, supposing that their obligations were

equal and similar to the obligations of stockholders in each of the other banks.

The Bank Guaranty Law is intended to and does destroy these equal conditions; its purpose is to create and it does create (under the guise of a voluntary law) a classification of banks by which certain banks may become guaranty banks and other banks shall be excluded, and by which the so-called guaranty banks are to have a preference and advantage over non-guaranty banks, even though the two classes of banks may exist in the same town, or in the same county, or in the same part of the state, and where conditions are precisely the same. The said Act is intended to classify depositors so that certain depositors in guaranty banks shall have an advantage over depositors in other banks, whereas all depositors ought to stand on an equality and enjoy equal rights and privileges.

Said Act further arbitrarily makes distinctions between depositors in the same bank (if it be a guaranty bank) by which certain depositors only shall be guaranteed and other depositors shall not be guaranteed; by which certain depositors shall have the right to absorb all the assets of the bank to the exclusion of other creditors without just cause, or reason, while no such discrimination, or classification exists as to depositors in banks not under the guaranty system. The details of these arbitrary distinctions and classifications will more fully appear in subsequent branches of the argument. They are now adverted to for the purpose of pointing out that the bank guaranty law from its very nature, scope and purpose necessarily results in creating unjust and arbitrary classifications of banks, and of depositors, by which certain *banks* and certain

depositors are denied the equal protection of the laws, and their property taken without due process of law, and whereby favored depositors in guaranteed banks are given privileges which are denied to depositors in the same banks, and which are denied to depositors in other banks, all in violation of the Constitution of the United States.

Said statute is also in violation of Sec. 17 of Art. 2 of the Constitution of Kansas, which provides "all laws of a general nature shall have a uniform operation" throughout the state.

The natural and necessary effect of the Kansas Bank Guaranty Deposit law is to produce partial and unequal discriminations which are condemned in principle by many adjudications.

II.

IT IS NO ANSWER TO SAY THAT ALL BANKS CAN ACCEPT OF THE PROVISIONS OF THE GUARANTY DEPOSIT LAW AND THUS ALL BANKS BE PUT ON AN EQUALITY, BECAUSE IT IS NOT TRUE IN FACT.

BY THE TERMS OF THE LAW MANY BANKS ARE EXCLUDED AND OTHERS BY REASON OF CIRCUMSTANCES CAN NOT ACCEPT ITS PROVISIONS.

(a) Incorporated banks only may accept the law, and private banks, although chartered under the general banking laws of the state, are excluded. (Sec. 1, rec. p. 19.)

(b) National banks, unless they shall subject themselves to the jurisdiction of the Bank Commissioner, and the provisions of the law (a thing impossible for want of corporate authority), or unless they shall re-incorpo-

rate as State banks, are excluded. (Secs. 8 and 13, rec. p. 24.)

(c) All banks which do not have a surplus of 10% are excluded (there are 13 of the complainant banks which do not have a surplus of 10%), although chartered and authorized to receive deposits under the general banking laws of the state, are excluded. (Sec. 1, rec. p. 19.)

(d) Newly organized banks until they have done business for one year are excluded, except they be located in a city where all other banks therein have failed for six months after the passage of the law to become guaranteed banks. (Sec 1, rec. p. 19.)

(e) Banks which have not and can not obtain the requisite consent of their stockholders and Board of Directors are excluded. (Sec. 1, rec. p. 19.)

(f) Banks which pay interest at a greater rate then 3% upon any form of deposit are excluded. (Sec. 7, rec. p. 23.)

(g) Banks which pay interest on savings deposits withdrawn before July or January 1st next following the date of the deposit are thereafter excluded. (Sec. 7, rec. p. 23.)

(h) Banks which pay interest on time certificates, cashed before maturity, are excluded. (Sec. 7, rec. p. 23.)

(i) Trust companies, although authorized under the general banking laws to receive deposits, are excluded. (Sec. 8, rec. p. 23.)

(j) *It is the claims of depositors that are to be secured, yet depositors have no voice as to whether a bank will or will not, or can or can not become a guaran-*

teed bank. It follows as of course that depositors in all banks which can not, or which do not accept of the law are arbitrarily discriminated against.

But should these difficulties *supra* be overcome (they never can be), and all banks should become subject to the guaranty law, only one difficulty is removed. Others, equally grave, it is impossible to remove. Only a limited class of depositors are guaranteed and other depositors and creditors are put at an arbitrary disadvantage. (Sec. 6.) Banks, State and National, in the business of banking find it essential to have deposits in other banks; to accept checks drawn upon, and bills of exchange issued by other banks, and to make temporary loans to other banks, and to rediscount notes for other banks, yet, as to all these claims complainant banks are excluded from the benefits of the guaranty feature of the law. All the assets of an insolvent bank shall first be taken to pay the claims of *depositors.* Banks which have loaned their credit to, or have made deposits with said insolvent bank, are deprived of their property without due process of law and are denied the equal protection of the laws. This same line of argument applies with equal force to each and singular of the classes of deposits, which, under Sec. 6 of the Act, are excluded from the guaranty feature. Thus we reach the inevitable conclusion that it is impossible under this statute to obtain either uniformity, or equality of rights, or privileges, and hence that the law is obnoxious to the long line of decisions which hold that laws must be uniform as to persons and classes under similar conditions.

III.

THE ARBITRARY AND CAPRICIOUS DISCRIMINATIONS BETWEEN DEPOSITORS AND OTHER CREDITORS, RENDERS THE BANK GUARANTY DEPOSIT LAW UNCONSTITUTIONAL.

By Sec. 6 of the Act depositors who may have the benefit of, and depositors who are excluded from the guaranty fund are as follows:

(a) Private deposits subject to check and not bearing interest are included, while like deposits which bear interest are excluded.

(b) Time certificates not payable in less than six months from date and not exceeding more than one year, bearing interest not exceeding 3%, and which interest shall cease at maturity, are included, all other time certificates are excluded;—time certificates payable in less than six months are excluded;—certificates running for more than one year are excluded;—certificates bearing interest at more than 3% are excluded.

(c) Savings deposits not exceeding in amount $100 to any one person and not subject to check and upon which the bank has reserved in writing the right to require 60 days' notice of withdrawal and bearing interest not to exceed 3% are included. Savings deposits exceeding $100 to any one person are excluded. Savings deposits upon which the bank has not reserved the right to require 60 days' notice of withdrawal are excluded. Savings deposits which draw interest exceeding 3% are excluded.

(d) Deposits which are primarily rediscounts are *expressly* excluded.

(e) Accounts for money borrowed by the bank are expressly excluded.

(f) All deposits in the bank which are otherwise secured are expressly excluded.

(g) An insolvent bank's obligations, as endorser upon bills rediscounted, are expressly excluded.

(h) The liability of the bank on bills payable are expressly excluded.

(i) Claims for money borrowed temporarily from correspondent banks are expressly excluded.

(j) All claims of creditors of every kind and nature, other than for deposits above enumerated as included, are excluded.

(k) All of the assets of the bank, including the double liability of stockholders, shall first be appropriated to the payment in full of the claims of depositors to the exclusion of all other creditors. (Sec. 4, rec. p. 21.)

What reason can be given to justify a law which provides that a deposit which does not draw interest shall be guaranteed and paid in full to the exclusion of a deposit which may draw interest? Is it the purpose of the law to prevent a depositor receiving interest, or contracting to receive interest on a deposit? Has the legislature a right to say that a man who has money shall be deprived of his constitutional right of contract, or that if he does contract for interest, that he shall be deprived of an equal right with others to collect, or receive back his money? Does the fact that a depositor may contract for, or receive interest, justify the enactment of a law which not only deprives him of his property right of contract, but also denies him an equal right with other depositors in the collection of his deposit and denies to him the equal protection of the laws?

In the case of time certificates the depositor may receive 3% interest up to the date of maturity, but his deposit is guaranteed only on condition that it shall not be payable in less than six months, nor exceeding one year from the date of the certificate. Has not the holder of a certificate the same constitutional right to have his deposit protected and paid whether the certificate runs for three months, six months, twelve months or eighteen months? Where does the state get the authority to say that if the deposit is for less than six months, or for more than twelve months it shall not be guaranteed, while if the time limit is anywhere between the period of six or twelve months it shall be guaranteed? Might not the legislature just as well say that if two men loan money to the same person, secured by a mortgage upon real estate, and one of them takes a note drawing 3% interest and payable not less than six months, nor more than twelve months from date, and the other takes a note payable either in less than six months, or more than twelve months from date, or contracts for more than 3% interest, that the first man shall have priority in payment, even to the exhaustion of all the mortgaged property and to the exclusion of the other? Confessedly such a law would be held unconstitutional. Is there any distinction between the illustration stated and the provision in Sec. 6 of the guaranty banking law?

Why the distinction between general deposits and savings deposits? Why should the merchant who may have a deposit ranging anywhere from $100 to $5,000 have a preferential right to collect his entire deposit, to the exclusion of savings deposits, and have any deficiency paid by the state, and the same right and privilege be denied to the laborer or mechanic or servant who may have a savings deposit exceeding $100?

Said provisions relating to savings deposits is subject to another severe criticism, to-wit: that no part of such account shall be guaranteed unless the bank "has reserved in writing the right to require sixty days' notice of withdrawal." That is to say, that the savings account deposit shall not have the guaranteed or preferential right of payment, which attaches to other individual deposits, if the bank has not made the special provision in writing to require sixty days' notice of withdrawal. In other words, if said reservation is not in writing the savings account is not guaranteed. If the notice of withdrawal is limited to thirty days, or forty days, or fifty days, the account is not guaranteed. Why is not a depositor, in the form of a savings account, entitled to the same constitutional protection, both as to property, as to the right to contract, and to due process of law and to the equal protection of the laws which attach to other depositors? Where the authority to make this unconstitutional discrimination against savings deposits?

Deposits which are rediscounts, or money borrowed by a bank, shall not come within the guaranty. It is not uncommon for banks to obtain money from correspondent banks in times of depression. By this method, banks may enable each other to meet the demands of their depositors. What good reason can be given why banks having a claim upon another bank for money upon a direct loan, or by a rediscount, shall not have the same right as that of a private depositor to have their claims paid pro rata? Why should a debt which an insolvent bank may owe to another bank for a loan, or a rediscount be discriminated against in favor of a debt which the same insolvent bank may owe to some private person, or firm, or corporation? How can you justify taking all of

the assets of the insolvent bank (which assets may include the result of the loan, or rediscount from another bank), and appropriate the same to the payment of depositors and to the exclusion of the claims of other creditors? This policy results in an unjust and arbitrary discrimination against other banks, State and National. It may go so far as to make it impossible for the bank to obtain credit to protect its depositors during a period of time necessary to realize upon its own assets and securities, and thus be unnecessarily forced into a receivership to the damage and loss of its general creditors.

The liability of a bank upon bills payable are excluded from the guaranty. The result is that persons who deposit money in the bank and take out in lieu thereof a draft, or bill of exchange, are without the guaranty. So all obligations of a bank of every kind and nature by which a bank becomes indebted to another (except the favorite depositors), are excluded from the guaranty. How justify such arbitrary discrimination?

The long and short of this guaranty law is that private deposits which may constitute a very limited part of the cash assets of the bank are made the favorites of the statute and are entitled to take all of the assets to the exclusion of other creditors who, under the constitutions of the State and of the United States, are entitled to equal protection.

The discrimination between the different classes of depositors and between depositors in different banks in the same town, or in the same locality, and under like conditions, renders the act unconstitutional, in that it deprives them of the equal protection of the laws. The guaranteed depositor may enforce his claim under the *law* of 1909, but depositors in non-guaranteed banks must enforce their remedy under the *general banking law* of

the state. All *creditors* of the bank, other than private depositors, can have their remedy *only* under the general banking law of the state. One law provides that depositors shall be paid in full, even though such payment takes all of the assets of the bank, in which case, other creditors of the same bank are deprived of all remedy for the enforcement of their claims. "The equal protection of the laws," in the 14th Amendment is a guaranty "that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances." *Connolly v. Union Sewer Pipe Co.*, 184 U. S., 540-559. *Ritchie v. People*, 155 Ill., 98, 105-6. *State vs. Hinman*, 65 N. H., 103, 23 Am. St. Reps., 22-25. *State v. Montgomery*, 94 Me., 192, 80 Am. St. Reps., 386. *Cotting v. Kansas City Stock Yards Co.*, 183 U. S., 79-109-112.

IV.

THE FACT THAT IN THE SAME CITY, OR LOCALITY SOME BANKS MAY AND SOME MAY NOT BECOME GUARANTEED BANKS PRODUCES SUCH AN ARBITRARY AND UNLAWFUL DISCRIMINATION BETWEEN DEPOSITORS OF THE SAME CLASS AS RENDERS THE WHOLE ACT UNCONSTITUTIONAL.

In the preceding chapter of this brief we were dealing with the discrimination between depositors in the same bank. The actual and practical working of the law presents a condition much more offensive to justice and fair dealing, and equally, if not more obnoxious to the constitutional provisions. In the same locality some banks have accepted the guaranty provisions and others have not, so that in the same town, or same county, there may be depositors who are entitled to share in the guar-

anty provisions under the law, and there are other depositors of the same kind and class and in every way entitled to the equal protection of the laws, who by reason of having their deposits in a neighboring bank are deprived of the guaranty provisions, and all without any fault or choice of their own. Depositors in bank (a) have no voice as to whether said bank shall, or shall not become a guaranteed bank, but the state steps in and says to its depositors (if the bank be not a guaranty bank) that their deposits shall not be guaranteed. The same state says to the depositors in bank (b) that their deposits shall be guaranteed. The state says to one set of depositors you may take all of the assets of the bank to pay your claims, and, if said assets are not sufficient, that the state will make up the deficiency by an appropriation out of the guaranty fund on deposit with the State Treasurer. The state says to the depositors in the non-guaranteed bank that they shall share only pro rata with all other creditors of the bank in which they have made their deposits, yet all these depositors may live in the same town, be engaged in the same kind of business without any possible line of distinction between them, except this arbitrary and capricious legislation enacted under the false, deceptive and misleading guise of a bank guaranty law.

In *McKinster v. Sager,* 163 Ind., 671 (106 Am. St. Reps., 268), the court, in speaking of a statute which discriminates between creditors, said: " 'But it is *not* the business of the state to *make discriminations* in favor of one class against another, or in favor of one employment against another. The state can have *no favorites.* Its business is to protect the industry of all, and to give all the benefit of equal laws.' "

But "arbitrary selection" can never be justified by calling it classification, the equal protection demanded by the Fourteenth Amendment forbids it. *Gulf, Colorado & Santa Fe R'y v. Ellis,* 165 U. S., 150-159. *McKinster v. Sager,* 163 Ind., 671. (106 Am. St. Reps., 268-277.) *Storck v. Baltimore City, et al.,* 101 Md., 476. *Cotting v. Kansas City Stock Yards Co.,* 183 U. S., 79-107.

The Kansas bank guaranty law does not make banks more solvent than they are under the general banking laws. It is a law designed solely to favor certain depositors.

Why not as well pass a statute requiring all depositors to surrender to the bank a part of their deposits to be set aside as a guaranty fund to pay depositors? Such a statute would add to the strength and assets of the bank. Why not pass a statute requiring all patrons of a bank who borrow money from the bank, or whose notes the bank discounts, to set aside a part of the money borrowed as a fund to secure the prompt payment to the bank of all loans and discounts? Such a statute would tend to make the bank more secure in times of financial depression. Banks would not fail if they could speedily realize upon their loans or securities. Would any man who favors the present bank guaranty law agree that such statutes, as suggested *supra*, would be constitutional? If such statutes would not be constitutional, what argument can be made to support the constitutionality of the statute in question?

V.

DEPOSITORS HAVE NO VOICE IN DECIDING WHETHER A BANK WILL OR WILL NOT COMPLY WITH THE BANK GUARANTY LAW, THE RESULT IS THAT DEPOSITORS, IN ORDER TO OBTAIN THE ADVANTAGES OR BENEFITS OF THE BANK GUARANTY LAW, MUST DEPOSIT THEIR MONEYS ONLY IN BANKS WHICH DO ACCEPT OF THE LAW AND WHICH MEANS A DISCRIMINATION AGAINST, AND DESTRUCTION OF, THE BUSINESS OF BANKS WHICH DO NOT, OR CANNAT COMPLY WITH THE CONDITIONS OF THE BANK GUARANTY LAW.

Independent of the discrimination between depositors, or as against creditors of a bank, the law is equally obnoxious to the constitution, in that it is a discrimination between banks. It discriminates in favor of banks that accept of its provisions, and against banks which do not and cannot accept of its provisions. *If there be in truth and in fact any good reason why depositors in banks should be guaranteed, the same reason would induce depositors to withdraw their money from banks not guaranteed and deposit their money in guaranteed banks.* Is it the purpose of the state to wrong, or discredit the bank duly authorized to do business under the general banking laws of the state simply because its directors or stockholders are unwilling to become a guaranteed bank, or because the bank is precluded from becoming a guaranteed bank under other provisions of the statute, to-wit: not having the surplus fund of 10%, or which pays interest on any form of deposits at a rate exceeding 3%; or private banks, or trust companies which cannot become guaranteed, or national banks which have no corporate power to become guaranteed banks?

Under the general banking law of the state of Kansas all banks were created with the expectation and un-

derstanding that they were to stand on an equality. That general banking law is still in force as the law of the state. The bank guaranty law does not repeal the old law, neither does it create a new law that shall govern all banks, or that shall be uniform as to all banks. It seems to have no purpose, or object, except to create a favorite class of depositors, and a favorite class of State banks, and to discriminate against all other persons, and against all non-guaranteed banks—and against all banks as creditors of other banks. It is an illustration of the strong hand of the state being laid upon the assets of the guaranteed banks and appropriating the same as a gratuity to pay the private claims of a private depositor that has become the favorite of state legislation.

Neither the right to regulate nor the police power of the state can be used as a weapon to destroy. "All persons should be equally entitled to pursue their happiness and acquire and enjoy property." *Barbier v. Connolly,* 113 U. S., 27-31; *Cotting v. Kansas City Stock Yards Co.,* 183 U. S., 79-106. The Supreme Court of Kansas in *State v. Haun,* 61 Kan., 146, among other things said, p. 153: "Why should not the nine employees who work for one corporation be equally protected with the eleven engaged in the same line of employment for another corporation? If such law is beneficial to wage earners in one instance, why not in the other?" Why not logically apply the same principle to the banks not guaranteed as well as to guaranteed banks, likewise as between banks themselves? One of the limitations of the police power is that it shall not enter "the realms of the destructive." *State v. Redmon,* 134 Wis., 89-105.

Conceding the power to reasonably regulate the business of banking, said power to regulate is not a power to destroy nor to take away the property of the banks

without due process of law and without just compensation. The above suggestion is sustained by the underlying principles in the following cases: *Lake Shore Ry. Co. v. Smith,* 173 U. S., 696; *Budd v. New York,* 143 U. S., 547; *Smyth v. Ames,* 169 U. S., 466; *Reagan v. Farmers Loan & Trust Co.,* 154 U. S., 97; *Cotting v. Kansas City Stock Yards Co.,* 183 U. S., 79.

VI.

THE POLICE POWER IS THE LAW OF NECESSITY. THE KANSAS BANK DEPOSITORS' GUARANTY LAW IS NOT AN EXERCISE OF THE POLICE POWER BECAUSE IT LEAVES IT VOLUNTARY WITH BANKS WHETHER THEY WILL OR WILL NOT BECOME GUARANTEED BANKS.

By the literal terms of the Kansas Bank Depositors' Guaranty Law it is left to the option of banks whether they will or will not become guaranteed banks. *If there exist a necessity in Kansas that all depositors in banks should have the benefit of the guaranty law, then the law to bring it within the scope of the police power should be compulsory upon all banks which receive deposits.* By the terms of said law private banks and trust companies, although chartered under the laws of the state, are prohibited from becoming guaranteed banks, wherefore, their depositors are not and can not have the benefit of the guaranty. The same principle applies to thirteen of the complainant banks which do not have the 10% surplus. The same principle applies to all banks which can not obtain the requisite consent of their stockholders and board of directors. *Wherefore, it appears upon the face of the law* that the legislature of Kansas did not act upon the belief that a necessity existed for the guaranty

of all bank depositors. They selected some and they excluded others.

In *Bryan v. City of Chester,* 212 Pa. St. 259, the court quoted with approval from *Crawford v. City of Topeka,* 51 Kans., 756: "All statutory restrictions of the use of property are imposed upon the theory that they are *necessary* for the safety, health or comfort of the public; but a limitation without reason or *necessity* cannot be enforced."

In *City of Passaic v. Patterson, etc. Co.,* 72 N. J. Law, 285, the court said: "It is *necessity* alone which justifies the exercise of the police power to take private property without compensation." The three last cases *supra* were quoted with approval in *People v. Murphy,* 195 N. Y., 126, and to which the court said (p. 135): "The classification, as well as the ordinance itself, must be based upon some *necessity* justifying the exercise of the police power. It has been said that the police power of a municipality is allied to the right of *self-preservation* in an individual."

In *Chy Lung v. Freeman et al.,* 92 U. S., 275, *Mr. Justice Miller* said, p. 280: "Such a right can only arise from a *vital necessity* for its exercise, and cannot be carried beyond the scope of that *necessity.*" In *Railroad Co. v. Husen,* 95 U. S., 465, *Mr. Justice Strong* said, p. 472: "It may not interfere with transportation into or through the state, beyond what is *absolutely necessary* for its self-protection."

In *State vs. Redmond,* 134 Wis., 89, the court said, p. 110: "The doctrine that the police power is really a law of necessity forms the key, it would seem, with which to unlock the mysteries, so far as practicable, of what is within and what is without the limits of such power."

In *City of Belleville v. Turnpike Co.*, 234 Ill., 428, the court said, p. 437: "It is co-extensive with self-protection, and is not inaptly termed the law of overruling necessity." It was on this principle that in *Sayre Borough v. Phillips*, 148 Pa. St., 482, a statute of Pennsylvania was declared to be unconstitutional because it applied to certain persons and not to others who are engaged in the same trade or pursuit. To justify the statute under the police power it should be the result of a demand of the public generally and there should be such an exigency for its enforcement to protect the public *that it should apply to all alike who are engaged in the same business.* Hence, in the Pennsylvania case the statute was held to be not within the police power.

If it be the law that a *necessity* must exist for the exercise of the police power the statute cannot be justified as an exercise of the police power which *leaves it to the will or caprice* of the citizen or the bank whether they will or will not accept of its provisions. The mere fact that it is *voluntary* is a declaration on the face of it that it is *not within* the police power and is not an exercise of the police power.

VII.

THE POLICE POWER CAN ONLY BE EXERCISED WHEN NECESSARY TO ACCOMPLISH A PUBLIC NEED. IT MUST BE DEMANDED BY THE PUBLIC GENERALLY AS DISTINCT FROM THE DEMAND OF A CLASS.

The bank depositors' law extends its benefits to a class of depositors, to-wit: to deposits which do not draw interest; to savings deposits limited to $100, and excludes deposits in private banks, deposits in trust companies, deposits in non-guaranteed banks, to savings deposits

exceeding $100, etc. (For further classification see chapters 2 and 3 of this brief.)

What necessity, real or imaginary, can justify a statute which declares in terms that depositors in one bank or class of banks shall be guaranteed, and declares that depositors in another bank or class of banks shall not be guaranteed? What rule of necessity can justify a statute which declares that favorite deposits shall be guaranteed and other claims against *the same bank* shall not be guaranteed, such as claims for rediscounts, money borrowed, etc.?

In *Lawton v. Steele*, 152 U. S., 133, the court, speaking to this point, said, p. 137:

> "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, *that the interests of the public generally*, as distinguished from those of a *particular class*, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

In *Hume v. Laurel Hill Cemetery*, 142 Fed., 552, the court, in speaking to the same point, said, p. 565:

> "In such instances, it should appear to the court that the conditions are such that the *interests of the public* generally justify such legislation, and that the act itself is *reasonable in its scope* and practical application."

In *Fisher Co. v. Wood*, 187 N. Y., 90, the court, speaking to the same point, said, p. 94:

> "To justify the state in interposing its authority in behalf of the public, *it must appear that the interest* of the public generally, as distinguished from those of a particular class, requires such interference and that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals."

In *State vs. Redmon,* 134 Wis., 89, the court drew special attention to this limitation of the police power and said, p. 111:

> "Controlling significance should be attached to the words above quoted, 'the interests of the public generally,' etc., 'require such interference.' Not that some individuals now and then, or even generally, demand it, or require it, but that the interests of the people generally require it. In other words, that it is reasonably essential or necessary to such interests that the subject thereof should be dealt with by the legislature."

If a statute under the police power can only be justified when demanded by the public generally, it should be a law which should be enforced against all persons and applied to all persons to which the demand applies. It is illogical to say that the public demands that depositors shall be guaranteed and at the same time have the law so framed that it is voluntary whether the depositors shall be or not be guaranteed. The same suggestion applies as to whether banks shall or shall not become guaranteed banks. A voluntary law is not in compliance with any demand for the protection of the rights of the public as depositors in banks.

VIII.

THE POLICE POWER DOES NOT RECOGNIZE FAVORITES. THE POLICE POWER WILL NOT JUSTIFY ARBITRARY OR CAPRICIOUS CLASSIFICATIONS.

The fact that the bank depositors law grants its benefits to certain depositors and to certain banks, and refuses its benefits to other depositors and to other banks, renders the statute unconstitutional.

The Supreme Court of Kansas, in *State v. Haun,* 61 Kan., 146, aptly said, p. 153:

> "The obvious intent of the act is to protect the laborer and not to benefit the corporation. Why should not the nine employees who work for one corporation be equally protected with the eleven engaged in the same line of employment for another corporation? If such law is beneficial to wage-earners in the one instance, why not in the other? The nine men lawfully paid for their labor in goods at a truck store might with much reason complain that the protection of the law was unequal as to them when they saw eleven men paid in money for the same service performed for another corporation engaged in a like business. *Such inequality destroys the law.*"

So we say here. If the guaranty law is a good thing for depositors in banks, why give it to some depositors and refuse it to others?

Ritchie v. The People, 155 Ill., 98, is a case wherein the court held a statute of Illinois, relating to the employment of labor, to be unconstitutional on the ground that it interfered with the liberty of the right to contract. The principle upon which the decision rested will be found stated on p. 105, where the court, in dealing with the *inequality of all under like circumstances*, said:

> "The 'law of the land' is 'general public law binding upon all the members of the community, under all circumstances, and *not partial or private laws*, affecting the rights of private individuals or classes of individuals.' (Millett v. The People, 117 Ill., 294.) The 'law of the land' is the *opposite* of 'arbitrary, unequal and partial legislation.' (The State v. Loomis, supra.) The legislature has no right to deprive one class of persons of privileges allowed to other persons under like conditions." * * * "In line with these principles, it has been held that it is not competent, under the constitution, for the legislature to single out owners and employers of a particular class, and provided that they shall bear burdens not imposed on other owners of

> property or employers of labor, and prohibit them from making contracts which other owners or employers are permitted to make. (*Millett v. The People, supra; Frorer v. The People, supra; Ramsey v. The People,* 142 Ill., 380.)"

State vs. Montgomery, 94 Me. 192, 47 At. 165, 80 Am. St. Reps. 386, is a case which involved the constitutionality of a statute of Maine, which excluded aliens from its privileges. The state endeavored to justify said classification, but the court held the statute unconstitutional. In the opinion of the court, speaking directly of the principle involved in the case at bar, said, pp. 391 and 394:

> " 'The equal protection of the laws' is guaranteed to all. 'The equal protection of the laws' places all upon a footing of legal equality, and gives the same protection to all for the preservation of life, liberty and property and the pursuit of happiness.' "
>
> "The inhibition of the Fourteenth Amendment that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation."

In the light of the above cases we put the query, What right has the State of Kansas by a special or particular statute to single out certain depositors of certain banks for its favoritisms, and to single out other banks for hostile legislation? Keep in mind that *all banks* existing in the State of Kansas are engaged in *a lawful business,* chartered under the general banking law of the state. The bank without 10% surplus, as a corporation, is entitled to the equal protection of the laws with the bank having more than 10% surplus, so of *private* bankers, *trust* companies, banks which pay more than 3% on deposits, etc. What right, we say, has the State of Kansas to single out

these banks for discriminating legislation and favorite legislation for other banks?

Concretely stated, the question is, has the State of Kansas a right to pass a special law which applies to certain depositors and to certain banks, when by a general law therefore existing, all banks and all depositors stand on an equality? Is not such special law unconstitutional?

The principle which lies beneath the above sentence, printed in italics, is supported in the cases cited *supra,* and is particularly marked in *State v. Goodwill,* 33 W. Va. 179, 25 Am. St. Reps. 683, which held unconstitutional a statute which provided that operatives and laborers engaged in mines and factories should have their wages paid in money of the United States. The statute did not apply to all operatives and laborers, although, manifestly, under the general law of the land, all operatives and laborers are entitled to equal protection in the payment of their wages. The statute was held unconstitutional, because it was "class" legislation. It was a special law for the benefit of a class, just as is the Kansas Bank Guaranty Law, a special law for the benefit of a class of creditors of banks, and for the creation of guaranteed banks as a class; singling them out from the other banks of the State of Kansas, incorporated and chartered under its general banking laws. In the West Virginia case the court said, p. 866:

> "The right of every individual must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by restricting the privileges of certain classes of citizens, and not of others, when there is no public necessity for such discrimination, is unconstitutional and void. Were it otherwise, odious

individuals or corporate bodies would be governed by one law, and the mass of the community, and those who make the law by another whereas a like general law affecting the whole community equally could not have been enacted."

Equality of right, equal protection of the laws, the protection of equal laws, are phrases almost synonymous and require that all shall be *treated alike.* Any statute which departs from this principle is declared to be "class legislation" and universally condemned.

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GOOD INTENTIONS ON THE PART OF THE LEGISLATURE WILL NOT JUSTIFY THE DISCRIMINATIONS.

In *Bonnett v. Vallier,* 136 Wis., 193, it is said, p. 200:

"Good intentions in the passage of a law or a praiseworthy end sought to be attained thereby cannot save the enactment if it transcends, in the judgment of the court, the limitations which the consituation has placed upon legislative power.

"The appeal is often made to courts directly or indirectly to look favorably upon a law because of the worthy purpose in the minds of the promoters in securing its place upon the statute books. That cannot go to the extent of causing hesitancy or failure to condemn a legislative act which clearly exceeds the lawmaking power." * * * "The greatest constitutional lawyer of our country during its early history aptly said:

" 'Good intentions will always be pleaded for every assumption of power, but they cannot justify it. The constitution was made to guard the people against the dangers of good intentions. When bad intentions are boldly avowed the people will promptly take care of themselves. They will always be asked why they should resist or question the exercise of power which is so fair in its object, so plausible and patriotic in appearance, and which has the public good alone confessedly in view. Human beings, we may be

> assured, will generally exercise power when they get it, and they will exercise it most undoubtedly under a popular government under the pretense of public safety or high public interest.' * * * 'They think there need be little restraint upon themselves.' ''

IX.

THE KANSAS BANK GUARANTY ACT, WHEN LOOKED AT COLLECTIVELY, IS SO FULL OF CLASSIFICATIONS THAT ARE ARBITRARY AND UNREASONABLE, AND OF DISCRIMINATIONS WHICH ARE UNLAWFUL THAT THE ENTIRE ACT MUST BE DECLARED TO BE UNCONSTITUTIONAL.

It may be said of the classifications between banks that they are arbitrary and that the discriminations between banks are arbitrary. The same is true as to the classifications of depositors and as to the discriminations between depositors. This evil assumes more serious gravity in the discriminations in favor of depositors and against creditors, against claims of banks arising out of re-discounts, and against claims of banks for moneys loaned. The rule of law is that classifications and discriminations are invalid unless they can be justified upon some *reasonable* ground, otherwise, they are regarded as *arbitrary* and *capricious* and condemned by the law and the constitution.

In *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis,* 165 U. S., 150, the court said, page 159: "But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this." The above was said in a case which held a statute of Texas to be unconstitutional, which gave a preferential right to certain claims against railroad corporations. It was a statute which in effect

gave certain creditors of the railroad corporation advantages over other creditors of the same corporation. It is not separable in principle from the case at bar, which, by its discriminations, gives preference to *certain* favorite depositors over *other* depositors and against *creditors* of banking corporations.

In *Storck v. Baltimore City, et al.,* 101 Md., 476, the court said: "Classification must be natural and not arbitrary. Arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this." The above was said with reference to a statute of Maryland which gave one class of property owners the privilege of erecting steps on the sidewalk and denied the same privilege to another class of property owners. So in the case at bar. The Kansas Bank Guaranty Law permits certain banks to enjoy the privilege of becoming guaranteed banks and denies to other banks the same privilege.

We need hardly hark back to what we have said in a previous chapter to the point that no sound reason can be given for the classifications and distinctions and discriminations between the different kinds of depositors, to-wit: general depositors, savings bank depositors, time certificate depositors, depositors in guaranteed banks and depositors in non-guaranteed banks; *all* found in a law *primarily enacted, as defendants say, for the security of the depositors.* How can such a classification and discrimination be sustained in the light of what was said in the *Ellis* case, *supra?* Mr. Justice Brewer concluded his analysis of the doctrine as follows: "It is apparent that the *mere fact* of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, *and that in all cases it must appear* not only that a classification has been made, but *also that*

it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection. Tested by these principles the statute in controversy cannot be sustained."

The court will note that we have italicized a phrase in the above quotation to emphasize our suggestion that it "must appear" that the classification is based on some reasonable ground; that it must appear that the classification is not a *"mere arbitrary selection."* Said language does not mean that the court will necessarily infer that the classification is reasonable and not arbitrary unless the contrary appear, but it must appear to the court that the classification is reasonable and not arbitrary. So in the case at bar we put the query, *wherein and how does it appear in this record that the classifications and discriminations are reasonable and not arbitrary?*

Bonnett v. Vallier, 136 Wis., 193, is a case where the court held a statute of Wisconsin, relating to the construction of tenement houses, to be unconstitutional. In said case the court noted that there was a distinction between the word *"reasonable"* as applied to police regulations and the word *"expediency."* The question of expediency vested discretion in legislation, but to be *"reasonable"* required something more than mere expediency. So in that case the court held that the statute relating to tenement houses was not reasonable and adjudged it to be void and unconstitutional.

The unwarranted and arbitrary discriminations in favor of depositors and against the complainant banks as creditors, and the complainant state banks which cannot become guaranteed banks, or are not guaranteed banks is a denial to them of the equal protection of the laws.

In *Cotting v. Kansas City Stock Yards Co.*, 183 U. S., 79, Mr. Justice Brewer quoted from the Ellis case, beginning with the phrase, "But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this," and concluded on that point, "No duty rests more imperatively on the court than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of government." Again, commenting on a decision of the Supreme Court of Kansas, said, page 109: "So we have the clear declaration of the Supreme Court of Kansas that legislation by which one individual or even one set of individuals is selected from others doing the same business in the same way and subjected to regulations not cast upon them, is a discrimination forbidden by the constitutional provision which obtains both in the Constitution of Kansas and in that of the United States to the effect that the equal protection of the laws is guaranteed to all." Again the court said, p. 112: "This statute is not simply legislation which in its *indirect* results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

The above quotations from the *Cotting* case are particularly appropriate to the discrimination which prohibits banks that do not have 10% surplus from becoming guaranteed banks and which excludes the depositors in such banks from the benefits of the guaranty provisions.

The said discrimination in the banking act can have no basis for its support except it be measured either by the extent of the business or the earning capacity of the bank. It is not based on the capitalization. It is discrimination based on profits of the bank. The principle is the same as that which the Supreme Court applied in holding the Stock Yards Act to be unconstitutional.

The same principle of law was announced in *Sayre Borough v. Phillips,* 148 Pa. St., 482, (33 Am. St. Rep., 842), where a license law passed by the legislature was held to be unconstitutional because it discriminated between classes: "If a statute, or a municipal ordinance, is in reality directed only against certain persons who are engaged in a given business, or against certain commodities, in such manner as to discriminate between the persons who are engaged in the same trade or pursuit, in aid of some at the expense of others, such statute or ordinance *is not a police,* but *a trade regulation;* and it has no right to shelter itself behind the police power of the state or the municipality." * * * "The present question is whether, under the pretense of police control, trade may be regulated in the interest of resident dealers by making the same business a lawful one to all who live on one side of a municipal line, and an unlawful one to all who live on the other side. We are very clear in our convictions that this cannot be done, and for this reason the judgment is affirmed."

What was said in the last case, *supra,* was in condemnation of a statute which made discriminations between persons engaged in the same trade or same business and similarly situated except that it licensed some and excluded others without any good reason therefor. If the statute had been directed against the *business* it should have applied to *all* engaged in the same business.

But because instead of being directed against the business it was directed against the *persons* it was held not to be *within the police power.* So in the case at bar the statute *selects* the depositors who are to be secured and *excludes* other depositors and it excludes *creditors* who are not among the class of favorite depositors. If the statute is to be construed as a regulation of banks it is equally faulty because, under the general banking laws of the State of Kansas, there are over seven hundred state banks. It selects out of the seven hundred for a bestowal of its benefits the banks which have a surplus of 10%, and those which obtain the consent of their stockholders and directors, and those which do not pay interest exceeding 3% on deposits, etc., and excludes from its benefits and privileges all other banks.

In *State v. Mitchell,* 97 Mo., 66; 53 Atl., 887; 94 Am. St. Rep., 481, the court declared unconstitutional a statute relating to hawkers and peddlers and, among other things, said, page 483: "If there be no real difference between the localities, or business, or occupation, or property, the state cannot make one in order to favor some persons over others." * * * "The inhibition of the Fourteenth Amendment that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designated to prevent any person or class of persons being singled out as a special subject for discriminating and favoring legislation."

So we say in the case at bar unless some *real difference* can be pointed out why depositors in one bank or class of banks *shall be guaranteed,* and depositors in other banks *shall not be guaranteed,* and why some *classes* of banks may become guaranteed banks and other *classes* of banks *shall not* be guaranteed, the Kansas Bank Guaranty Law is unconstitutional and void.

X.

ONE OF THE PRIMARY PURPOSES OF THE KANSAS BANK GUARANTY LAW IS TO TAKE THE PROPERTY OF CERTAIN BANKS AND APPROPRIATE THE SAME TO PAY THE PRIVATE CLAIM OF AN INDIVIDUAL AGAINST SOME OTHER BANK AND WITH WHOM THE CONTRIBUTING BANKS SUSTAIN NO OBLIGATION, MORAL OR CONTRACTUAL. IT IS THE TAKING OF THE PROPERTY OF ONE PERSON TO PAY THE PRIVATE DEBTS OF ANOTHER, HENCE IS UNCONSTITUTIONAL.

The taking of property of one person and giving it to another in payment of a private claim is taking property without due process of law and is a denial of the equal protection of the laws and cannot be justified under the police power of the state. *Dobbins v. Los Angeles,* 195, U. S., 223-237; *Crescent Liquor Co. v. Platt,* 148 Fed. 894-898; *The Alma Coal Co. v. Cozad,* 79 Ohio St., 344; *Loan Association v. Topeka,* 20 Wall., 655; *State v. Osawkee Township,* 14 Kan., 418; *Lowell v. Boston,* 111 Mass., 454; *Baltimore & Eastern etc. Ry. Co. v. Spring,* 89 Md., 510; *Mo. Pac. Ry. v. Nebraska,* 164 U. S., 403; *Dodge v. Mission Tp., Shawnee Co., Kans.,* 107 Fed., 827; *Lucas Co. v. State,* 75 Ohio St., 114; *State v. Frochlich,* 118 Wis., 129; 99 Am. St. Reps., 985; *William Deering & Co. v. Peterson,* 75 Minn., 118; *State v. Switzler,* 143 Mo., 287; 65 Am. St. Rep., 653.

In Loan Association v. Topeka, 20 Wall., 655, *Mr. Justice Miller* said, p. 664: "To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not

legislation. It is a decree under legislative forms." And again on p. 665: "If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the baker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town."

In *First State Bank v. Shallenberger,* 172 Fed. 999, which involved the constitutionality of the Nebraska Bank Guaranty Law, *Van Devanter,* Circuit Judge, and *Munger,* District Judge, speaking to the precise point under consideration, said, p. 1002:

> "It is apparent that the effect upon the community of the insolvency of banks can differ only in degree, and not in kind, from the effect of the insolvency of any other debtor. In fact, the failure of large railway, insurance, mercantile, or manufacturing companies may, and often does, more profoundly affect the business community than the failure of a small bank.
>
> "If the state possesses the power to single out a certain form of business activity and to compel the citizen who engages in it to pay the losses of strangers, whose only relation to him is that their business is known by the same general name, why may it not require all those engaged in one occupation to pay the losses of those engaged in other occupations? And if the state may require those of one class to contribute to the losses of the same class, it is but a step further to require the fortunate to bear the financial losses of the less fortunate as often as inequality of fortune may arise. The provis-

ions relating to the depositors' guaranty fund cannot be sustained on the theory that society is discharging an obligation it owes to those pauper and dependent classes who have always been regarded as proper subjects of its bounty and care. The creditors of banks are like the creditors of any other debtor, and this act is not confined to the relief of paupers; but payment is required to all depositors, whatever their financial condition may be." * * *

"It is needless to review at length the many cases which hold to the same effect. See *Parkersburg v. Brown*, 106 U. S., 487, 491, 1 Sup. Ct. 442, 27 L. Ed. 238 (bonds to aid manufacturers); *Cole v. La Grange*, 113 U. S., 1, 9, 5 Sup. Ct. 416, 28 L. Ed. 896 (bonds to aid manufacturers); *Dodge v. Mission Tp.*, 107 Fed., 827, 832, 46 C. C. A. 661, 54 L. R. A. 242 (bonds to aid manufacturers); *Allen v. Inhabitants*, 60 Me., 124, 11 Am. Rep. 185 (bonds to aid manufacturers); *Coates v. Campbell*, 37 Minn., 498, 35 N. W., 366 (bonds to aid manufacturers); *Lowell v. Boston*, 111 Mass., 454, 15 Am. Rep., 39 (bonds to aid sufferers from Boston fire); *Patty v. Colgan*, 97 Cal., 251, 31 Pac. 1133, 18 L. R. A. 744 (aid to flood sufferers); *Lucas County v. State*, 75 Ohio St. 114, 135, 78 N. E. 955 (annuities for the blind); *Wisconsin Keeley Institute Co. v. Milwaukee Co.*, 95 Wis., 153, 70 N. W. 68, 36 L. R. A. 55, 60 Am. St. Rep. 105 (bounty to private inebriate hospital); *State v. Froehlich*, 118 Wis., 129, 94 N. W. 50, 61 L. R. A. 345, 99 Am. St. Rep. 985 (bounty to private inebriate hospital); *State v. Switzler*, 143 Mo., 287, 45 S. W. 245, 40 L. R. A. 280, 65 Am. St. Rep. 653 (bounty to students attending state university); *Kingman v. City of Brockton*, 153 Mass., 255, 26 N. E. 998, 11 L. R. A. 123 (aid in erection of building for Grand Army post); *State v. Osawkee Tp.* 14 Kan., 418, 19 Am. Rep. 99 (furnishing seed grain to farmers); *Deering & Co. v. Peterson*, 75 Minn., 118, 77 N. W. 568 (appropriation to purchase seed grain for those without crops); *Deal v. Missis-*

sippi County, 18 S. W. 24, 107 Mo. 464, 14 L. R. A. 622 (bounties to growers of trees); *Mo. Pac. Ry. Co. v. Nebraska,* 164 U. S., 403, 17 Sup. Ct. 130, 41 L. Ed. 489 (taking of railway right of way for private elevator), *Atchison, T. & S. F. Ry. Co. v. Campbell,* 61 Kan., 439, 59 Pac. 1051, 48 L. R. A. 251, 78 Am. St. Rep. 323 (free tickets to stock shippers); *Harp v. Choctaw, O. & G. Ry. Co.* (C. C.) 118 Fed. 169 (compelling building of spur track to coal mine); *Oxnard Beet Sugar Co. v. State of Nebraska,* 73 Neb., 57, 66, 68, 102 N. W. 80, 105 N. W. 716 (bounty for growers of sugar beets); *Michigan Sugar Co. v. Dix,* 124 Mich., 674, 83 N. W. 625, 56 L. R. A. 329, 83 Am. St. Rep. 354 (bounty for growers of sugar beets); *Minnesota Sugar Co. v. Iverson,* 91 Minn., 30, 97 N. W. 455 (bounty for growers of sugar beets)."

XI.

THE KANSAS BANK GUARANTY LAW IMPAIRS THE OBLIGATION OF CONTRACTS IN ALL CASES WHERE COMPLAINANT BANKS HAVE LOANED MONEY TO, REDISCOUNTED BILLS FOR, OR OTHERWISE BECAME CREDITORS OF GUARANTEED BANKS. ALSO AS TO ALL CREDITORS OF SUCH BANKS WHO ARE NOT WITHIN THE GUARANTY PROVIDED BY SECTION 6.

No state shall pass any "law impairing the obligation of contracts." (Section 10, Art. 1, Constitution.) The obligation of a contract in the constitutional sense includes the right to have the contract enforced, and, that no statute which tends to postpone or retard the enforcement of the contract for the benefit of others and which discriminates against such right of enforcement is constitutional. *People v. Common Council,* 140 N. Y., 300, *Barnitz v. Beverley,* 163 U. S., 128, *Western National*

Banks v. Reckless, 96 Fed. 77, *Peninsular Lead, etc., Works v. Union Oil, etc., Co.,* 88 Fed., 777.

It has been ruled that an act is unconstitutional which changes the remedy unless it supplies an alternative remedy equally adequate and efficacious. *People ex rel v. Common Council,* 140 N. Y., 300. *McGahey v. Va.,* 135 U. S., 662-693.

Statutes which seriously impair the remedy which existed at the time the contract was entered into, "impair the obligation" of the contract within the meaning of the constitution. *Hawthorne v. Calef,* 2 Wal., 10. *Louisiana v. New Orleans,* 102 U. S., 203. *Seibert v. Lewis,* 122 U. S., 284.

In *Louisiana v. New Orleans, supra,* the court said, pp. 206-7: "The obligation of contract, in the constitutional sense, is the means provided by law by which it can be enforced, by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tends to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened. The latin proverb, *qui cito dat bis dat*—he who gives quickly gives twice—has its counterpart in a maxim equally sound, *qui serius solvit, minus solvit*—he who pays too late, pays less. Any authorization of the *postponement* of *payment,* or of means by which such postponement may be effected, is in conflict with the constitutional inhibition."

In view of the law in cases cited *supra,* what justification can be urged in favor of the provisions of the Kansas Bank Guaranty Law which authorize the bank examiner to take *all of the assets* of the bank including the money realized from the stockholders and appropria-

ting the same first in *payment* of the amount due on the certificate issued to favorite *depositors* including 6% interest thereon to the exclusion of all other creditors. The complainant banks have a right to the enforcement of the remedy as it existed at the time when they made their contract of loans. When these loans were made under the general banking law of Kansas all creditors shared pro-rata. The constitution says that the state of Kansas shall not pass a law which destroys or impairs that remedy.

XII.

THE RULING OF THE CIRCUIT COURT THAT COMPLAINANT BANKS WERE NOT IN A POSITION TO COMPLAIN OF THE UNLAWFUL DISCRIMINATIONS, OR TO INSIST THAT THE GUARANTY DEPOSIT LAW WAS UNCONSTITUTIONAL ON THE SUGGESTION THAT COMPLAINANT BANKS MIGHT BECOME GUARANTEED BANKS AND THEREBY BE PUT ON AN EQUALITY WITH OTHER GUARANTEED BANKS IS UNSOUND.

IT OVERLOOKS THE POINTS AT ISSUE.

On this point Pollock, J., said, rec. p. 46:

"In so far as complainants qualified to accept the provisions of the Act, but decline to do so, I see no just cause on their part to complain of discrimination against them. If any are discriminated against by the terms of the act, the privileges of which they may accept, and they decline to do so, it is their failure to accept, and not the law, which causes the injury, and they will not be heard to complain. As to those complainants disqualified from participating in the benefits of the act, it is not shown the condition which produces this disqualification may not be changed by such banks and the provisions of the act then accepted. If so, such of complainants may not be heard to contend of the law's dis-

crimination against them, for, in such case, it is not the law, but the facts constituting the disqualifying conditions which produces the discrimination."

What was said by Pollock, J., overlooks the questions at issue—also loses sight of the fact that complainant banks can not become guaranteed banks with agreeing that their assets may be taken from them to pay the debts of an other bank, and without compensation.

First. If each of the complainant banks could and did become guaranteed banks it would not necessarily follow that all of the 700 banks in the state would become guaranteed banks, and if not, there would still remain all the discriminations which exist between guaranteed and non-guaranteed banks, and between deposits in guaranteed and non-guaranteed banks, and between depositors in the same bank, and between depositors and creditors in all banks, and complainant banks would remain affected by these conditions.

Second. Complainant banks owe a duty to their depositors and to their creditors alike; that is, that all classes of banks' creditors shall have the equal protection of the laws in the collection of their claims in case of insolvency of the bank. Should the complainant banks become guaranteed they would thereby be required to accept of the provision in the Bank Guaranty Deposit Law by which certain of their depositors should become the favorites of the law to the exclusion of other depositors in the same bank and to the exclusion of its creditors as distinct from depositors.

If complainant banks become guaranteed banks it would subject them to the obligation of the law by which, if they borrowed money from other banks, or made bills payable to other banks, or issued their bills of exchange

to other banks, or rediscounted paper with other banks, that all of said obligations should be postponed in payment until after the assets should first be appropriated to the payment of the favorite depositors under the guaranty deposit law.

Complainant banks as now situated are being conducted under the general banking law of the state of Kansas, which declares equality to all depositors and all creditors, without discrimination against any and without favorites. Complainant banks may become guaranteed banks, only by an agreement upon their part to submit to these unlawful, unreasonable and unconstitutional discriminations? *Is it to be said as a principle of sound law that a citizen or a bank can not be heard to complain of the unlawful and unconstitutional discriminations in a law,* because, forsooth, he may put himself into a class to which the said discriminations belong?

Third. If all of the incorporated banks in the state should become guaranteed banks there still would remain all the discriminations which exist between depositors, and between depositors and creditors, and between private banks and trust companies and guaranteed banks, *and by reason of the ramifications of the banking business, complainant banks would still be subjected to said unlawful discriminations in their dealings with private banks and trust companies, and likewise for checks accepted, drafts cashed, money loaned and paper rediscounted in their dealings with guaranteed banks.*

Fourth. Thirteen of the complainant banks do not have a surplus fund equal to 10% of their capital stock, (rec. p. 11) and although duly authorized and chartered to do a banking business under the general banking laws of the State of Kansas *cannot* become guaranteed banks.

Is it to be said that said thirteen banks cannot be heard to complain of the unlawful and unconstitutional discriminations in the Bank Deposit Guaranty Law by the suggestion that it was simply a misfortune of the said banks that they do not have the 10% surplus? Has not a bank, which does not have a 10% surplus, the same right to protect its depositors and its creditors that a guaranteed bank has? Have not the depositors in a bank, which does not have 10% surplus, the right to as favorable consideration and treatment under the law as a depositor in a bank which has more than 10% surplus? It is not the fault of the depositor that the bank does not have a 10% surplus. The Kansas Bank Guaranty Deposit Law puts depositors in one bank in one class and depositors in another bank in another class. One of the distinctions in this classification is, that one bank does not have a 10% surplus and another bank has a 10% surplus. Said discriminations and classifications exist, even though both banks are on the same street of the same city and the depositors inhabitants of the same locality.

Fifth. Is it to be said that complainant banks have no right to ask to have the unconstitutional Bank Guaranty Deposit Law enjoined, for the reason, suggested in the Circuit Court, that the complainant banks themselves may become guaranteed banks, *when the doing so would subject the complainant banks* to make the deposit with the State Treasurer of $500 for each $100,000 capitalization, and likewise *subject* them to submitting to the taking of their assets to pay the private debts of another bank? If it be unconstitutional to take the money of one citizen, or of one bank, and appropriate the same to some other citizen or some other bank as a gratuity, has not the citizen or the bank whose money is thus to be taken

a right to complain? Is it an answer to say that the citizen or the bank whose money is thus wrongfully to be taken that he *may submit* to the taking and therefore he has no standing in a court of equity to enjoin the enforcement of such unconstitutional law?

Sixth. The complainant banks are depositors in and creditors of other State banks. If complainants become guaranteed banks they must agree to submit to the terms of the guaranty deposit law by which they cannot collect from other banks that which may be owing to them on checks cashed, drafts purchased, bills re-discounted or money loaned *until after all depositors of said other banks shall be first paid in full.* Is it to be said that complainant banks have no right to enjoin this unconstitutional law by the suggestion that they may voluntarily subject themselves to these unlawful and unconstitutional discriminations against them? The complainant banks are before the court insisting upon their property rights just as a citizen has a right to insist upon his property rights. Is it correct to say that a citizen or a bank cannot obtain the permission of the state to carry on a particular business *until he first binds himself to submit to a taking from him of his legal and constitutional rights* to the equal protection of the laws, and that his property shall not be taken from him except by due process of law? A citizen or a bank *may voluntarily do this*, but if he does not want to do so, is he without standing in a court of equity?

Seventh. The question of jurisdiction of the court or the right of the complainant banks to challenge the unconstitutionality of the Kansas Bank Depositors Guaranty Law does not depend alone upon the discriminations in the statute, *but depends also upon the other facts,*

to-wit: that this law takes from the banks which submit to it their property (a part of their assets) and appropriates the same as a gratuity to a private creditor of some other bank. This wrongful and unlawful taking of property from one person and giving it to another is sufficient to confer jurisdiction. The case of *Loan Association v. Topeka,* 20 Wall., 655, sustains the jurisdiction in the case at bar, and other like cases cited in Chap. X. of this brief sustain the jurisdiction in the case at bar. The case of *Merchants' Bank v. Pennsylvania,* 167 U. S., 461, is inapplicable to the facts in the case at bar.

Eighth. If the ruling of *Pollock J.,* is right, then the complainant banks must either *submit to the discriminations* against them as banks, and against them as *creditors* of other banks, or take the *alternative* of having a part of their *assets taken from them without compensation* and *appropriated to a private use.* There is nothing in *Merchants Bank v. Pennsylvania,* 167 U. S., 461, that denies the right of the complainant banks to appeal to the court for a protection of their constitutional rights under the facts existing in the case at bar.

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